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No. 86-1427

In the Supreme Court of the United States

OCTOBER TERM, 1986

PATRICK COLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a sexual relationship that a law enforcement agent carried on with petitioner's female companion, while investigating petitioner's activities, constituted outrageous government misconduct requiring dismissal of the indictment on due process grounds.

2. Whether the district court should have suppressed evidence that was obtained as a result of court-authorized electronic surveillance, because the government's application for the surveillance order failed to reveal that a law enforcement officer was engaged in a romantic affair with petitioner's female companion and had access to petitioner's residence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 807 F.2d 262. The order of the district court (Pet. App. 15a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on December 11, 1986. The petition for a writ of certiorari was filed on March 3, 1987, and is therefore substantially out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted, on a conditional plea of guilty, of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; possession of cocaine with intent to distribute it, in violation of 21

U.S.C. 841(a)(1); and three counts of using a telephone to facilitate a drug conspiracy, in violation of 21 U.S.C. 843. He was sentenced to seven years' imprisonment and a $25,000 fine on the conspiracy count, to a concurrent seven-year term and a six-year special parole term on the possession count, and to concurrent two-year terms on the telephone facilitation counts. The court of appeals affirmed.

1. As summarized in the opinion of the court of appeals (Pet. App. 3a-4a), the pertinent facts are that, in January 1985, Drug Enforcement Administration (DEA) agents, acting in conjunction with the Police Department of Northboro, Massachusetts, began an investigation of petitioner's suspected cocaine-trafficking activities. One of the officers involved in the investigation was Detective Charles Bradley, a member of the Northboro Police Department.

As part of the investigation, Detective Bradley regularly telephoned petitioner's apartment, which petitioner shared with Joan Adamson, his live-in girlfriend. Adamson took messages for petitioner when he was not at home, and, after a period of time, Detective Bradley developed a telephone acquaintance with Adamson. In April 1985, Bradley asked Adamson to meet him in person, both because he enjoyed speaking with her and because he wanted to cultivate her as a possible source of information about petitioner's activities. He informed his superiors and his fellow officers about his plans and advised Adamson of his identity as a detective investigating petitioner. Adamson, however, told Bradley that she was unaware of petitioner's involvement with drugs and would not assist in the investigation.

Early in May 1985, a romantic relationship developed between Bradley and Adamson, and the two engaged in sexual liaisons in petitioner's apartment on 12 to 15 occa-

sions. While in the apartment, Bradley had the opportunity to observe petitioner's sophisticated security systems, consisting of surveillance cameras, television video monitors, and a sequential relay board. On none of the occasions, however, did he observe drugs or drug-related paraphernalia. As the affair continued, Bradley repeatedly questioned Adamson about petitioner's drug-trafficking activities. She insisted that she knew nothing about them and declined to assist in the investigation.

In early August 1985, a DEA agent who was involved in the investigation began preparing an affidavit for electronic surveillance of petitioner's telephone, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Bradley, who then stopped seeing Adamson, did not tell the DEA agent of his affair with her. Consequently, information concerning the affair and Bradley's entries into petitioner's apartment to meet with Adamson was not included in the wiretap application, although the application contained a great deal of other information supplied by Bradley. A surveillance order was issued on September 9, 1985.

On September 24, 1985, on the basis of information derived from electronic interceptions conducted pursuant to the court's order, DEA agents obtained a warrant to search petitioner's apartment. Execution of the warrant resulted in the seizure of cocaine, scales, and other drug-related paraphernalia and led to the eventual arrest and indictment of petitioner, Adamson, and others.[1]

Following Adamson's indictment and petitioner's imprisonment, Adamson and Detective Bradley renewed their affair. During this period, Bradley made disparaging remarks to Adamson concerning the attorneys who were representing petitioner and her (Pet. App. 6a-7a).

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[1] When the government learned of the affair between Adamson and Bradley, it dropped the charges against Adamson (Pet. App. 2a).

2. Before trial, petitioner moved to dismiss the indictment on the ground that Bradley's affair with Adamson constituted such egregious misconduct that it should bar his prosecution and that Bradley, by virtue of his disparaging remarks concerning petitioner's attorney, had interfered with petitioner's Sixth Amendment right to counsel. He also moved to suppress the fruits of the electronic interceptions on the ground that omission from the wiretap application of the fact that Bradley had been inside his apartment on 12 to 15 occasions violated 18 U.S.C. 2518(1)(c) and (3)(c), which require the government to establish, and the court to find, that alternative investigative means, other than electronic surveillance, would not succeed or would be too dangerous.

The district court rejected both of petitioner's arguments that, because of Bradley's activities, the indictment should be dismissed. Addressing the argument that Bradley's conduct with Adamson was so outrageous as to warrant dismissal of the indictment, the court held that, despite its impropriety, Bradley's conduct did not amount to a "coldblooded" effort to exploit Adamson and that no violation of due process occurred (2 H. Tr. 60-61).[2]

As to the argument that Bradley's disparaging remarks interfered with petitioner's right to counsel, the court stated that, based on the affidavits and other papers, it was prepared to infer that, during the postindictment period, Bradley pursued a course of action designed to interfere with the Sixth Amendment rights of petitioner and Adamson. The court concluded, however, that, because the government had avoided the use of any evidence derived from those conversations, petitioner was not prejudiced

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[2] "H. Tr" refers to the transcript of the pretrial hearing in the district court.

by Bradley's conduct, and he therefore was not entitled to dismissal of the indictment or any other form of relief (Pet. App. 16a).[3]

Before ruling on the claim relating to the omissions from the Title III application, the district court conducted a hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154 (1978), to determine whether the omission was material and, if so, whether the electronic surveillance order still should have issued. The trial judge, who was also the judge who had issued the surveillance order, found that the information concerning Bradley's liaison with Adamson was "not insubstantial" and was "intentionally omitted" from the warrant application. Nevertheless, the judge concluded that the information about Bradley's relationship with Adamson was not material to the issuance of the order. He reasoned that, because of Adamson's inability or unwillingness to furnish information about the drug conspiracy, he still would have issued the warrant even if the application had contained information concerning the affair (Pet. App. 11a; 2 H. Tr. 59, 61-67).

3. The court of appeals affirmed. Addressing petitioner's due process claim based on allegedly outrageous government conduct, the court held that, although Bradley's conduct in carrying on a sexual affair with Adamson could not be condoned, it was not a due process violation (Pet. App. 6a). Addressing petitioner's claim that Bradley's disparaging remarks to Adamson concerning their counsel interfered with petitioner's right to counsel, the court noted that the attorney had capably represented petitioner throughout the proceedings and that the disparagement did not result in any prejudice to

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[3] The district court recognized, however, that evidence of such prejudice might arise during the course of the trial. The court therefore left it open to the defense to reassert the Sixth Amendment claim at a later point in the proceedings.

petitioner. The court also held that, in the wake of *United States* v. *Morrison*, 449 U.S. 361 (1981), dismissal of the indictment as a prophylactic measure was impermissible even though the violation may have been deliberate (Pet. App. 8a-9a). Finally, with respect to the omission from the wiretap application of any reference to Bradley's activities with Adamson, the court of appeals held that the district court's finding that the omission did not involve material facts was not "clearly erroneous" and therefore should be sustained on appeal (*id.* at 11a-12a).

ARGUMENT

1. Relying on *United States* v. *Russell*, 411 U.S. 423 (1973), petitioner contends (Pet. 4-6) that Detective Bradley's conduct in carrying on a sexual relationship with Adamson while investigating the activities of her boyfriend was so egregiously improper that it should bar his prosecution. Petitioner does not claim that there is a conflict in the circuits on this issue, and in fact several courts of appeals have rejected similar (or more substantial) claims.

In *Russell*, this Court rejected the claim that an undercover agent entrapped the defendant as a matter of law by furnishing an essential ingredient for the manufacture of a controlled substance. The Court acknowledged, however, that it "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" (411 U.S. at 431-432). In *Hampton* v. *United States*, 425 U.S. 484 (1976), a majority of the Court subsequently agreed that, in certain circumstances, the government's actions in conducting an investigation may be so outrageous as to violate due process. See 425 U.S. at 491-495 (Powell & Blackmun, JJ., concurring); *id.* at 496 (Brennan, Stewart & Marshall, JJ., dissenting). In

his concurring opinion, however, Justice Powell pointed out that the issue in *Russell* was whether police overinvolvement in a crime was so outrageous that it violated considerations of due process and that, when the defendant is predisposed to commit the offense, instances where such action would bar a conviction would be rare (*id.* at 492-495 & n.7).

In the wake of *Hampton*, the courts of appeals that have addressed the defense of outrageous government conduct have emphasized that " 'the due process channel which *Russell* kept open is a most narrow one' " and that "[t]he outrageous government conduct defense is available only where 'the government is so involved in the criminal endeavor that it shocks [the] sense of justice.' " *United States* v. *Stenberg*, 803 F.2d 422, 429 (9th Cir. 1986) (citations omitted); see, *e.g.*, *United States* v. *Nations*, 764 F.2d 1073, 1077 (5th Cir. 1985) (emphasis in original) ("the outrageous government conduct defense is available only upon proof of government *overinvolvement* in the charged crime"); *United States* v. *Tobias*, 662 F.2d 381, 386 (5th Cir. 1981) (same), cert. denied, 457 U.S. 1108 (1982); see also *United States* v. *Kelly*, 707 F.2d 1460, 1468 (D.C. Cir.), cert. denied, 464 U.S. 908 (1983); *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). In this case there is no evidence that Detective Bradley's liaison with Adamson resulted in any involvement whatsoever by government agents in petitioner's ongoing cocaine operation. Under the reasoning of these authorities, the defense is therefore simply unavailable.

Although in *Rochin* v. *California*, 342 U.S. 165, 172 (1952), the Court held that evidence may be supressed on due process grounds when the manner in which the government obtains the evidence offends the decencies of a civilized society, the application of that principle has properly been limited to instances in which the government's

conduct directly invades some personal right of the defendant. See *United States* v. *Kelly*, 707 F.2d at 1468 n.49; *United States* v. *Alexandro*, 675 F.2d 34, 40-41 (2d Cir.), cert. denied, 459 U.S. 835 (1982); see also *United States* v. *Simpson*, No. 84-5301 (9th Cir. Apr. 3, 1987), slip op. 9 ("outrageous conduct" defense limited to cases of "brutality and coercion"). In this case, Bradley's relationship with Adamson not only failed to infringe petitioner's personal integrity so as to deprive him of due process of law, but, as the court below reasoned, it was not of such a nature as to offend contemporary standards of decency. Accord *Simpson*, slip op. 9-10 (even "the deceptive creation and/or exploitation of an intimate relationship" with the suspect himself—something considerably more troublesome than the nondeceptive relationship at issue here—"does not exceed the boundary of permissible law enforcement tactics").

As the district court found, Bradley initiated his relationship with Adamson for the purpose of gathering evidence against petitioner, but the continuation of the affair was not a calculated effort to develop information. Rather, the affair developed into a mutual romance so that "it [was] not at all clear * * * who was seducing whom" (2 H. Tr. 56-57, 60). Indeed, Bradley pursued the affair long after it became apparent to him that Adamson would not be a fruitful source of information and in complete disregard of its potential adverse impact on the ongoing investigation.[4] In these circumstances, the courts

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[4] Petitioner argues (Pet. 6) that reversal of his conviction is warranted as a prophylactic measure to discourage the recurrence of such behavior in future cases. As the Court has repeatedly emphasized, however, in the absence of prejudice to the defendant, the appropriate means of deterring misconduct by law enforcement officers is to initiate disciplinary proceedings against them. See *United States* v. *Hasting*, 461 U.S. 499, 506 & n.4 (1983); *United States* v. *Payner*, 447 U.S. 727, 733-734 & n.5 (1980); *Hampton* v. *United States*, 425 U.S.

below properly concluded that, despite the impropriety of the relationship, no due process violation occurred. Cf. *United States* v. *Prairie*, 572 F.2d 1316, 1319 (9th Cir. 1978) (use of prostitute by government to ensnare drug dealer not violative of due process); *United States* v. *Simpson, supra* (same).[5]

2. Petitioner also claims (Pet. 6-7) that the government's application for an electronic surveillance order was fatally deficient because it failed to disclose to the district judge who issued the order that, because of his relationship with Adamson, Bradley had access to petitioner's residence. More specifically, petitioner maintains that that information, if available to the issuing judge, would have demonstrated that alternative means of investigation were available to law enforcement authorities. This claim was also properly rejected by the courts below.

The statute that provides procedures for the interception of wire or oral communications requires that a wiretap application include, among other things, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous" (18 U.S.C. 2518(1)(c)). It also pro-

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at 490 (plurality opinion); see also *United States* v. *Morrison*, 449 U.S. 361, 365 (1981).

[5] Nor is petitioner entitled to relief as the result of Bradley's disparaging remarks to Adamson concerning the attorneys representing Adamson and petitioner. See Pet. 5. As the Court explained in *United States* v. *Morrison*, 449 U.S. at 365 (footnote omitted), in rejecting an identical claim, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation [of the defendant's right to counsel] may have been deliberate." In this case, the government introduced no evidence derived from Bradley's postindictment conversations with Adamson, and petitioner failed to point to any prejudice that he suffered as a result of Bradley's remarks (Pet. App. 9a, 15a). There was therefore no basis for relief.

vides that a judge may issue an ex parte order for a wiretap if he determines on the basis of the facts submitted that, among other things, "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous" (18 U.S.C. 2518(3)(c)). When the wiretap application fails to discuss certain alternative available means of conducting an investigation, the touchstone for determining whether wiretap evidence should be suppressed is whether the omissions were material to the issuance of the order, *i.e.*, whether, if the omitted information had been included in the wiretap application, the order still would have issued. See *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978); *United States* v. *Ippolito*, 774 F.2d 1482, 1484-1486 (9th Cir. 1985); *United States* v. *Brooklier*, 685 F.2d 1208, 1221 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983).

In this case, the trial judge determined that, even if he had been apprised of Bradley's access to petitioner's residence as a result of his affair with Adamson, he still would have issued the interception order. He would have done so, the judge explained, because Adamson either lacked the information necessary to reveal the operation of the conspiracy or demonstrated her unwillingness to share information concerning the scheme with law enforcement authorities (Pet. App. 10a-11a). Consequently, even if Bradley's relationship with Adamson constituted the type of alternative investigative procedure contemplated by Section 2518(1)(c), the failure to refer to its availability in this case was not a material omission from the surveillance application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
JOHN F. DE PUE
Attorney

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